

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMAZON.COM, INC.,

Defendant.

No. 2:14-CV-01038-JCC

**JOINT REPORT REGARDING SEALED
SUMMARY JUDGMENT RECORD**

The Court's June 20, 2016, Order on Motion to Intervene and Motion to Unseal directed "the parties to review the summary judgment record to determine what materials, if any, may be unsealed." Dkt. 261, at 4. The parties have completed their review, and consistent with the Court's Order, Amazon.com, Inc. ("Amazon"), the Federal Trade Commission ("FTC"), and intervenors Professor Rebecca L. Tushnet and MediaPost Communications ("Intervenors") hereby submit this Joint Report Regarding Sealed Summary Judgment Record.

To comply with the Court's Order, both Amazon and the FTC re-reviewed the entire summary judgment record. Amazon identified sealed information that it agrees can be unsealed (i.e., more narrowly redacted versions of documents currently filed publicly or redacted versions of documents currently filed solely under seal). Amazon provided the FTC and Intervenors with these redacted documents. The FTC and Intervenors identified additional sealed information that they contended should be unsealed and/or that they believed Amazon would agree would be

appropriate for unsealing. Amazon reviewed each of those recommendations and agreed with many, but not all, of them.

Based on Amazon's review and after conferring with the FTC and Intervenors, Amazon agrees that documents identified below may be filed publicly in redacted or less-redacted form. To accomplish this purpose, redacted or more narrowly redacted versions of the identified documents are attached as exhibits to this Joint Report. For each such document, the table below identifies the current docket number(s) corresponding to each document, where bracketed entries refer to sealed versions. Some documents have multiple publicly filed versions because Amazon or the FTC previously filed a version with fewer redactions than those in the prior publicly filed version (or filed a redacted version of a document filed only under seal at the time).

Attachment	Dkt. #(s)	Title
-1	98, [109], 138, 142-4, 144-1	Plaintiff's Motion for Summary Judgment
-2	104, [112], 142-4	Plaintiff's Motion in Limine to Exclude Expert Testimony
-3	[156], 158	Plaintiff's Response in Opposition to Defendant's Motion for Partial Summary Judgment
-4	[182], 184	Plaintiff's Reply in Support of its Motion for Summary Judgment
-5	[188], 189	Amazon's Reply in Support of Its Motion for Partial Summary Judgment
-6	[113], 142-1 (at 5-9)	Ex. 12 to 2/2/2016 Rahamim Declaration
-7	[113], 142-1 (at 10-38)	Ex. 15 to 2/2/2016 Rahamim Declaration
-8	[114], 142-1 (at 39-47)	Ex. 17 to 2/2/2016 Rahamim Declaration
-9	[115], 142-1 (at 60-68)	Ex. 53 to 2/2/2016 Rahamim Declaration

Attachment	Dkt. #(s)	Title
-10	[116], 142-1 (at 69-73)	Ex. 54 to 2/2/2016 Rahamim Declaration
-11	[116]	Ex. 65 to 2/2/2016 Rahamim Declaration
-12	142-2 (at 1-8)	Ex. 92 to 2/2/2016 Rahamim Declaration
-13	[117]	Ex. 98 to 2/2/2016 Rahamim Declaration
-14	[118]	Ex. 105 to 2/2/2016 Rahamim Declaration
-15	[118]	Ex. 107 to 2/2/2016 Rahamim Declaration
-16	[162], 161-1 (at 16-27)	Ex. 108 to 2/22/2016 Adler Declaration
-17	[162], 161-1 (at 28-38)	Ex. 109 to 2/22/2016 Adler Declaration
-18	[119], 142-2 (at 9-12)	Ex. 112 to 2/22/2016 Adler Declaration
-19	[119], 142-2 (at 13-25)	Ex. 121 to 2/2/2016 Rahamim Declaration
-20	[119]	Ex. 124 to 2/2/2016 Rahamim Declaration
-21	[120]	Ex. 140 to 2/2/2016 Rahamim Declaration
-22	[120], 142-2 (at 29-37)	Ex. 141 to 2/2/2016 Rahamim Declaration
-23	[121], 142-2 (at 38-42)	Ex. 145 to 2/2/2016 Rahamim Declaration
-24	[122], 142-2 (at 43-51)	Ex. 154 to 2/2/2016 Rahamim Declaration
-25	[162], 161-1 (at 39-44)	Ex. 156 to 2/22/2016 Adler Declaration
-26	[124], 142-2 (at 52-60)	Ex. 202 to 2/2/2016 Rahamim Declaration
-27	[162], 161-1 (at 45-51)	Ex. 203 to 2/22/2016 Adler Declaration
-28	106-4 (at 52-102), [126], 142-2 (at 61-112)	Ex. 337 to 2/2/2016 Rahamim Declaration
-29	[127], 142-3 (at 1-52)	Ex. 340 to 2/2/2016 Rahamim Declaration
-30	[127], 142-3 (at 53-75)	Ex. 500 to 2/2/2016 Rahamim Declaration

Attachment	Dkt. #(s)	Title
-31	[127], 142-3 (at 143-154)	Ex. 508 to 2/2/2016 Rahamim Declaration
-32	[127], 142-3 (at 155-163)	Ex. 509 to 2/2/2016 Rahamim Declaration
-33	[127], 142-3 (at 164-179)	Ex. 510 to 2/2/2016 Rahamim Declaration
-34	[127], 142-3 (at 180-197)	Ex. 511 to 2/2/2016 Rahamim Declaration
-35	161-2 (at 44-57), [165], 194 (at 26-39)	Ex. 544 to 2/22/2016 Adler Declaration
-36	[224], 226-1, 253-1	Order Granting Amazon's Motion for Partial Summary Judgment and Granting FTC's Motion for Summary Judgment

FTC's Statement: For the reasons discussed in its prior briefing (Dkt. 229 & 238), the FTC believes the entire summary judgment record should be unsealed, including the Court's opinion (Dkt. 224). In particular, information that is already public and material that does not contain financial data (*see in their entirety* Dkt. 122 at 1-10, Ex. 153 *and* Dkt. 162 at 14-19, Ex. 57; *see in significant part* Dkt. 118 at 1-21, Ex. 105; Dkt. 116 at 6-15 (redacted version at Dkt. 142-1 at 74-83), Ex. 61; Dkt. 162 at 1-13 (redacted version at Dkt. 161-1 at 1-13), Ex. 47; Dkt. 162 at 59-66, Ex. 531; Dkt. 163-65, Ex. 536) should not remain under seal.

Amazon's Response: As demonstrated in multiple submissions and in response to the Court's June 20 Order, Amazon has tried throughout this litigation to minimize the amount of material filed under seal. With respect to each of the exhibits cited by the FTC in the preceding paragraph, Amazon has agreed that the quoted or cited material in the FTC's briefing may be publicly filed without redaction. *See* Attachment 1 to this Joint Report, at 1, 2, 4; Attachment 3, at 16. Particularly since the public will have access to the portion of the documents that the FTC brought to the Court's attention, Amazon's sensitive business

1 information (e.g., business/marketing planning and strategy) contained in the
2 underlying documents should remain under seal.

3 Intervenors' Statement: Intervenors commend Amazon for having agreed to unseal many
4 more parts of the summary judgment record than it had previously done. Because intervenors
5 do not have access to the underlying unredacted record, intervenors have a limited ability to
6 make arguments about whether particular redactions are justified, unlike the Federal Trade
7 Commission whose counsel does have access to the unredacted record. (By contrast,
8 intervenors did have access to the entire unredacted summary judgment ruling of the Court, and
9 therefore presented detailed arguments about why each individual fragment of redaction in that
10 opinion was unjustified). In assessing their position, intervenors note that the Federal Trade
11 Commission still believes that the entire summary judgment record should now be disclosed.
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13 However, intervenors do not agree with the application of any of the Court's past rulings
14 to intervenors' request for unsealing. First, intervenors did not litigate the issue before summary
15 judgment was granted; they are not seeking reconsideration of a ruling against them. Second,
16 although intervenors recognize that the Court considers the FTC to be relitigating an issue that
17 the Court decided in the pre-summary judgment period, intervenors understand that there was no
18 truly adversary litigation about specific redactions. Third, once the Court has its summary
19 judgment decision, the balancing calculus changes, and Amazon needs to justify each individual
20 withholding based on the post-ruling calculus. Moreover, the passage of time affects the need
21 for confidentiality; Amazon needs to justify its withholding based on the harm from disclosure in
22 2016.
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24 Finally, intervenors took advantage of the fact that they could see behind the sealing of
25 the summary judgment opinion to make particularized arguments about each redacted word,
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1 number or phrase. Amazon has never responded with a particularized argument about each
2 redaction, and although the Court endorsed Amazon's position, its orders addressing those
3 issues, DN 251, June 9, 2016, and DN 261, June 20, 2016, did not include a particularized
4 explanation of its rulings. Intervenor submit that the Court should provide such an explanation
5 both so that the public can understand its ruling and so that the Ninth Circuit can have a basis to
6 perform **its** review function, in the event of an appeal. Consequently, intervenors urge the Court
7 to insist on particularized justifications from Amazon for each redaction from the opinion, and to
8 issue a particularized ruling on each redaction.
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11 Amazon's Response: Amazon disagrees that the Court should revisit its prior
12 sealing decisions for the reasons discussed in Amazon's briefing and the Court's
13 well-reasoned orders. Although review of the Court's summary judgment Order
14 was not a part of the Court's direction to the parties for this Joint Report, based on
15 this effort, Amazon has identified two redactions in the current public version of
16 the Order (Dkt. 253-1) that may be unsealed. A revised version of the Order with
17 these two changes is attached to this Joint Report, as indicated in the table above.
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